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DATO' SRI MOHD NAJIB TUN HJ ABDUL RAZAK v. PEGUAM NEGARA & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
HASNAH MOHAMMED HASHIM JCA
LAU BEE LAN JCA
B HAS ZANAH MEHAT JCA
[CIVIL APPEALS NO: W-01(A)-146-03-2019 & W-01(A)-148-03-2019]
14 OCTOBER 2019

C ***ADMINISTRATIVE LAW:*** *Judicial review – Application for – Determination of legality, validity and appropriateness of appointment of Senior Deputy Public Prosecutor – Whether there was duplicity in proceedings – Whether justiciability of appointment considered in substantive hearing – Whether there was abuse of process of court*

D Criminal proceedings were commenced against Dato Sri Mohd Najib Hj Abdul Razak ('DS Najib'), the appellant in Appeal No W-01(A)-146-03/2019 and Muhammad Shafee Md Abdullah ('TS Shafee'), the appellant in Appeal No W-01(A)-148-03/2019, wherein, Datuk Seri Gopal Sri Ram ('GSR') was appointed as the Senior Deputy Public Prosecutor ('Senior DPP') in both criminal cases. By letters dated 18 September 2018 and E 26 September 2018, TS Shafee requested from the Attorney General ('AG'), for a copy of the letter of appointment of GSR. The AG, through a letter in response, refused to provide a copy on grounds that the applicants had no right to have a copy of the letter of appointment issued to GSR and that the existence could not be doubted as it was physically shown to counsel. The F appellants' ('applicants') position was that they were not disputing the existence of the letter of appointment but objecting to the appointment of GSR as a Senior DPP. Dissatisfied with the reasons given by the AG in the letter of appointment, the applicants filed two applications to commence judicial review to challenge and review the AG's decision. The High Court G dismissed both the applications and hence, the appeals. The applicants also filed a criminal motion seeking to disqualify GSR from continuing to act as the Senior DPP in certain criminal cases. The High Court dismissed the motion for the disqualification of GSR and the decision was affirmed by the Court of Appeal. The Federal Court allowed the appeal in part and ordered the production of a copy of the letter of appointment. The applicants H contended that the High Court Judge ('HCJ') erred in failing to properly consider the applications to commence judicial review. The HCJ found that the applicants had met the threshold for leave but nevertheless dismissed the applications and allowed the preliminary objection raised by the respondents. The applicants further contended that both the judicial review I applications and the disqualification motions were brought under separate and distinct jurisdictions of the High Court; the judicial review application is a public law remedy challenging the legality of the decision of the AG

appointing GSR as a Senior DPP. On the other hand, the criminal motion is a private law remedy seeking the disqualification of GSR on grounds of conflict, bias and unfitness.

Held (allowing appeals with costs)
Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

(1) The function of the court in exercising its power to grant leave to commence judicial review is to filter the application before it, *ie*, to determine whether the application was not frivolous and vexatious, and that there is an arguable case to merit further argument. In dismissing the application to commence judicial review on the basis of the preliminary objection, the trial judge failed to fully appreciate that there was no duplicity or multiplicity in proceeding. The High Court Judge erred in allowing the preliminary objection. The only burden the applicants needed to satisfy was the low threshold for leave to apply to commence judicial review. The applicants had succeeded in showing that there was an arguable case that merited the case to proceed for the substantive hearing. (paras 31 & 46)

(2) The main issue for determination in the judicial review was the legality, validity and the appropriateness of the appointment of GSR as Senior DPP by the AG. The doctrine of *res judicata* did not apply as the applications involved different considerations and different reliefs. In the criminal motion, the court did not deal with the justiciability of the AG's decision to appoint GSR as Senior DPP. The issue of justiciability of the appointment would be considered by the court in the substantive hearing of the judicial review. On the other hand, the disqualification motions were to determine whether GSR ought to be disqualified from continuing to act as a prosecutor in the applicants' case. The nature and jurisdiction of the judicial review applications and the disqualification motions before the criminal court were clearly separate and distinct. Therefore, the issue of multiplicity and duplicity did not arise as the remedies sought were different. (paras 47 & 48)

(3) In the circumstances, the proper challenge to the legality of the decision of the AG in appointing GSR as a Senior DPP was by judicial review and the applicants were not estopped from mounting the judicial review applications. Also, the argument of the applicants mounting a second attempt to disqualify GSR as Senior DPP did not arise. Hence, the AG's argument of the existence of an abuse of process must also fail. (paras 50 & 52)

Case(s) referred to:
Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2014] 1 CLJ 289 FC ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 1 LNS 1837 CA ***(refd)***

Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia [1989] 1 LNS 76 HC ***(refd)***
George John v. Goh Eng Wah Bros Filem Sdn Bhd & Ors [1987] 1 LNS 111 HC ***(refd)***
Gouriet v. Union of Post Officer Workers [1978] AC 435 ***(refd)***
Muhammad Shafee Md Abdullah v. PP [2019] 1 LNS 844 HC ***(refd)***
Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561 FC ***(refd)***
PP v. Dato' Sri Mohd Najib Hj Abdul Razak [2019] 8 CLJ 313 FC ***(refd)***
R v. Secretary of State for the Home Department, ex parte Rukshanda Begum [1990] Crown Office Digest 109 ***(refd)***
Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***
Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors [2010] 1 LNS 1390 HC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 376(3), 377, 378, 379
Malaysian Anti-Corruption Commission Act 2009, s. 23
Rules of Court 2012, O. 53 r. 2(4)

(Civil Appeal No: W-01(A)-146-03-2019)
For the appellant - Shafee Abdullah & Sarah Abishegam; M/s Shafee & Co
For the respondents - Tommy Thomas; AG, Shamsul Bolhassan, Ahmad Akram Gharib, Mustapha Kunayalam, Liew Horng Low Wen Zhen, Mohamad Syakil Mohamad Zulkifli, Ann Khong Hui Lee; SFCs

(Civil Appeal No: W-01(A)-148-03-2019)
For the appellant - Harvinderjit Singh & Wee Yeong Kang; M/s Shafee & Co
For the respondents - Tommy Thomas; AG, Shamsul Bolhassan, Ahmad Akram Gharib, Mustapha Kunayalam, Liew Horng Low Wen Zhen, Mohamad Syakil Mohamad Zulkifli, Ann Khong Hui Lee; SFCs

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: WA-25-393-12-2018 (overruled).]

Reported by S Barathi

JUDGMENT

Hasnah Mohammed Hashim JCA:

[1] There are two appeals emanating from one judgment arising from the decision of the High Court refusing the applications for leave to commence judicial review proceedings:

(i) WA-25-393-12-2018 and

(ii) WA-25-377-12-2018.

[2] In the High Court, the two applications were heard together and after hearing submissions by counsels, the learned High Court Judge dismissed both applications. Dato' Sri Mohd Najib bin Hj Abdul Razak ('DS Najib') is the appellant in Appeal No: W-01(A)-146-03-2019 ('146'), and

Muhammad Shafee bin Md Abdullah ('TS Shafee') is the appellant in Appeal No. W-01(A)-148-03-2019 ('148'). Aggrieved with the decision of the High Court, DS Najib and TS Shafee (collectively referred to as 'the applicants') through Appeals 146 and 148 respectively appealed to the Court of Appeal.

[3] Both the appeals were fixed before us. There was no order for the appeals to be heard together. However, since the issues to be argued were identical in both appeals, it was agreed by the parties that for the purposes of both the appeals, it was convenient that applicants' counsels submitted first. The learned Attorney General (AG) appearing on behalf of the respondents addressed this court after both counsels in Appeals 146 and 148 have submitted. It was also agreed that the decision of this court in Appeal 146 will be binding on Appeal 148. After due deliberation and having carefully considered the submissions of both parties on 26 August 2019, we found that there are merits in the appeals and allowed both the appeals with costs. We now give reasons for our decision with respect to both the appeals in one common judgment.

[4] For ease of reference, in this judgment, the parties will be referred to as they were in the High Court.

The Judicial Review Applications

[5] Both the applicants in their respective application sought the following prayers:

> 1. An order of *certiorari* to quash and/or set aside the decision of the 1st respondent to not produce and/or disclose to the Applicant a copy of the letter of appointment in relation to the appointment of the 3rd respondent as a Senior Deputy Public Prosecutor purportedly under Section 376(3) of the Criminal Procedure Code;
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> 2. An order of *mandamus* or otherwise that the respondents do forthwith produce and/or disclose to the Applicant a copy of the letter of appointment executed by the 1st respondent in relation to the appointment of the 3rd respondent as a Senior Deputy Public Prosecutor purportedly under Section 376(3) of the Criminal Procedure Code;
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> 3. A declaration that the 1st respondent's appointment of the 3rd respondent as a Senior Deputy Public Prosecutor pursuant to a letter of appointment dated on or about 30 August 2018 and/or otherwise is *ultra vires* and/or in excess of the statutory powers of the 1st respondent and is therefore a nullity, void and/or of no effect;
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> 4. An order of *certiorari* to quash and/or set aside the 1st respondent's appointment of the 3rd respondent as a Senior Deputy Public Prosecutor pursuant to a letter of appointment dated on or about 30 August 2018 and/or otherwise;
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> 5. A declaration that there is a conflict of interest between the appointment of the 3rd respondent as a Senior Public Prosecutor under Section 376(3) of the Criminal Procedure Code and his continuous practice as an Advocate & Solicitor of the High Court of Malaya;

A 6. A declaration that the 3rd respondent has acted and/or continues to act in conflict of interest of his purported appointment as a Senior Deputy Public Prosecutor;

7. A declaration that the 3rd respondent is not a 'fit and proper person' to have been appointed as a Senior Deputy Public Prosecutor pursuant to
B Section 376(3) of the Criminal Procedure Code;

8. An order that the 3rd respondent be restrained and/or prohibited from continuing to act as a Senior Deputy Public Prosecutor and/or to appear on behalf of the 1st respondent in the following cases involving the applicants:

C (i) Kuala Lumpur High Court Case No. WA-45-7-11/2018;

(ii) Kuala Lumpur High Court Case No. WA-45-8-11/2018

(iii) Kuala Lumpur Sessions Court Arrest Case No. WA- 61R-21-10/2018;

D (iv) Kuala Lumpur High Court Case No. WA-61R-26-102/2018; and

(v) Kuala Lumpur High Court Case No. WA-45-6-10/2018.

9. An order that 1st respondent be restrained and/or prohibited from further authorising the 3rd respondent to continue acting as a Senior Deputy Public Prosecutor and/or to appear on behalf of the
E 1st respondent in the following cases involving the applicants:

(i) Kuala Lumpur High Court Case No. WA-45-7-11/2018;

(ii) Kuala Lumpur High Court Case No. WA-45-8-11/2018

(iii) Kuala Lumpur Sessions Court Arrest Case No. WA- 61R-21-10/2018;
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(iv) Kuala Lumpur High Court Case No. WA-61R-26-102/2018; and

(v) Kuala Lumpur High Court Case No. WA-45-6-10/2018.

10. Costs; and

G 11. Such necessary and/or consequential and/or further and/or other orders, reliefs and/or directions which this Honourable Court may deem fit and proper in the circumstances.

The Decision Of The High Court

H **[6]** The applications for leave to commence judicial review were heard together in the High Court. The respondents raised a preliminary objection on the issue of multiplicity, in view of the motions filed by the applicants in the criminal court in respect of Datuk Seri Gopal Sri Ram's ('GSR') appointment. The learned High Court Judge allowed the preliminary objections as the prayers sought by the applicants are the same as in the
I criminal motions. Accordingly, the learned judge dismissed both the applicants' applications for leave to commence judicial review.

Salient Facts

[7] DS Najib is the former Prime Minister of Malaysia whilst TS Shafee is an advocate and solicitor of the High Court of Malaya practising in the firm of Messrs Shafee & Co. Both applicants claimed that they are adversely affected by the purported exercise of the powers of the AG in appointing GSR as a Senior Deputy Public Prosecutor.

[8] On 4 July 2018, criminal proceedings were commenced against DS Najib in the Kuala Lumpur Sessions Court whereby he was charged with 21 charges under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 and a further four charges under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activity Act 2001 as well as one charge under s. 23 of the Malaysian Anti-Corruption Commission Act 2009. The charges were subsequently amended on 8 August 2018.

[9] Through a media release on 31 August 2018, the AG had announced the appointment of GSR as Senior Deputy Public Prosecutor:

> ... in order to spearhead this entire process, I am pleased to announce the appointment of Datuk Seri Gopal Sri Ram Senior Deputy Public Prosecutor pursuant to section 376(3) of the CPC.

[10] After the media release on 13 September 2018, the DS Najib's legal counsel, TS Shafee, was charged in the Kuala Lumpur Sessions Court under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activity Act 2001.

[11] GSR was appointed as Senior Deputy Public Prosecutor to lead the prosecution in both the criminal cases against the applicants. It is contended by the applicants upon request of the counsel for DS Najib and TS Shafee, the assisting Deputy Public Prosecutor, Ahmad Akram Gharib, handed to TS Shafee's counsel an original copy of the appointment instrument dated 30 August 2018 appointing GSR pursuant to s. 376(3) CPC. Amongst the terms of the appointment are:

(i) GSR was to have conduct and supervision over both the investigation process by the various investigation agencies and the prosecution of cases related to the IMDB;

(ii) GSR was appointed whilst retaining his private practice as an advocate and solicitor;

(iii) GSR's appointment is subject to the practice and etiquette rules under the Legal Profession (Practice & Etiquette) Rules 1978 and under the Legal Profession Act 1976.

[12] Counsels for the applicants were informed by the Assisting Deputy Public Prosecutor to write to the AG for a copy of the said letter of appointment. By letters dated 18 September 2018 and 26 September 2018,

TS Shafee's solicitors wrote to the AG requesting for a copy of the letter of appointment of GSR. In the interim, criminal proceedings were commenced against the applicants. On 26 September 2018, a follow-up letter by TS Shafee's counsel through Messrs Shafee & Co was sent to the AG requesting the same to be supplied to them.

[13] The AG responded through a letter dated 1 October 2018 refusing to provide a copy on the grounds that the applicants have no right to have a copy of the letter of appointment issued to GSR. It was also stated in the letter that the fact of its existence cannot be in doubt since it was physically shown to the counsel. During the proceeding, counsel for TS Shafee put on record that TS Shafee objected to GSR acting as Senior Deputy Public Prosecutor on various grounds.

[14] There are four actions commenced by the applicants relating to the appointment of GSR as Senior Deputy Public Prosecutor:

No.	Applicant	Case
1	DS Najib	Criminal Application No. WA-44-41-12/2018
2	TS Shafee	Criminal Application No. WA-44-203-12/2018
3	DS Najib	Judicial Review Application No. WA-25-393-12/2018
4	TS Shafee	Judicial Review Application No. WA-25-377-02/2018

[15] It is the applicants' position that they are not disputing the existence of the letter of appointment but objecting to the appointment of GSR as a Senior Deputy Public Prosecutor. Dissatisfied with the reasons given by the AG in the letter of appointment dated 1 October 2018, the applicants filed the two applications to commence judicial review to challenge and review the AG's decision. The grounds in support of the applications are summarised as follows:

(i) The validity, legality and appropriateness of GSR's appointment is a critical prerequisite of the validity of the investigations and the prosecutions GSR has conducted. The applicants contended that as a person whose prosecution was instituted and/or is being conducted by GSR, the applicants are adversely affected and is entitled to question and enquire into the validity, legality and appropriateness of the appointment.

(ii) In appointing GSR, the AG acted beyond the ambit and *ultra vires* to the AG's powers under s. 376(3) of the Criminal Procedure Code (CPC). The appointment of GSR under s. 376(3) CPC is a nullity, void and of no effect and should be quashed and/or set aside.

(iii) The AG has acted improperly by appointing GSR and authorising GSR to have direction and supervision over the investigation process.

(iv) Despite his appointment as Senior Deputy Public Prosecutor, GSR continues to act for private individuals and to act against the State in both civil and criminal matters.

[16] Out of abundance of caution, the applicants also filed a criminal motion seeking to disqualify GSR from continuing to act as Senior Deputy Public Prosecutor in the following criminal cases:

(i) WA-45-7-11-2018 and WA-45-8-11-2018 ("the 1MDB case");

(ii) WA-45-10-12-2018 ("the MOF case"); and

(iii) WA-61R-26-12-2018 ("the PAC case").

The main reason as explained by the applicants was to avoid a situation of being out of time if a jurisdictional challenge is raised. The applicants had further stated that given the separate and distinct nature of the relief sought in both proceedings, there is no duplicity or multiplicity of proceedings.

[17] The criminal motions sought the following reliefs:

(i) An order that the respondent do forthwith and in any event no later than three days from the date of this order, produce a copy of the letter of appointment executed by the respondent in relation to the appointment of Datuk Seri Gopal Sri Ram as a senior Deputy Public Prosecutor purportedly under s. 376(3) of the Criminal Procedure Code;

(ii) An order that the respondent do simultaneously provide the applicant with copies of the document pursuant to para. 1 above;

(iii) A declaration that the Public Prosecutor's appointment of Datuk Seri Gopal Sri Ram as a Senior Deputy Public Prosecutor pursuant to the letter of appointment and/or otherwise is *ultra vires* the powers of the Public Prosecutor and is therefore a nullity, void and/or of no effect;

(iv) A declaration that there is a conflict of interest between the appointment of Datuk Seri Gopal Sri Ram as a Senior Public Prosecutor under s. 376(3) of the Criminal Procedure Code and his continuous practice as an Advocate & Solicitor of the High Court of Malaya;

(v) A declaration that Datuk Seri Gopal Sri Ram has acted and/or continues to act in conflict of interest of his purported appointment as a Senior Deputy Public Prosecutor;

(vi) A declaration that Datuk Seri Gopal Sri Ram is not a "fit and proper person" to be appointed as a Senior Deputy Public Prosecutor pursuant to s. 376(3) of the Criminal Procedure Code;

(vii) An order that Datuk Seri Gopal Sri Ram be disqualified from continuing to act as a Senior Deputy Public Prosecutor ("SDPP") and/or to appear on behalf of the Public Prosecutor in Kuala Lumpur High Court Case No: WA-45-6-10/2018 (*Public Prosecutor v. Muhammad Shafee Md Abdullah*) and Kuala Lumpur High Court Case No: WA-45-7-11-2018 (*Public Prosecutor v. Dato' Sri Mohd Najib bin Hj Abd Razak*)

(viii) Any further and/or other order, relief or direction which this Honourable Court may deem fit and proper in the circumstances.

[18] The applicants, however, in the criminal motions confined to seeking the following reliefs:

(i) an order that the AG do forthwith and in any event no later than three days from the date of this order, produce a copy of the letter of appointment executed by the respondent in relation to the appointment of GSR as a Senior Deputy Public Prosecutor purportedly under s. 376(3) of the CPC; and

(ii) an order that Datuk Seri Gopal Seri Ram be disqualified from continuing to act as a Senior Deputy Public Prosecutor and/or to appear on behalf of the Public Prosecutor.

[19] After hearing arguments, the learned High Court Judge in the criminal proceedings dismissed the motion for the disqualification of GSR. The decision of the High Court was affirmed by the Court of Appeal. The applicants appealed to the Federal Court. On 7 August 2019, the Federal Court affirmed the decision of the Court of Appeal on the issue of disqualification. The Federal Court allowed the appeal in part and ordered the Public Prosecutor to produce a copy of the letter of appointment and a copy to be given to counsels of the applicants. The same was produced on 9 August 2019.

The Appeal

[20] Before us, learned counsel for the applicants contended that the learned High Court Judge erred in failing to properly consider the applications to commence judicial review that was before her. The learned High Court Judge found that the applicants had met the threshold for leave but nevertheless dismissed the application and allowed the preliminary objection raised by the respondents.

[21] Learned counsel for the applicants contended that both the judicial review applications and the disqualification motions were brought under separate and distinct jurisdictions of the High Court. The judicial review application is a public law remedy challenging the legality of the decision of the AG appointing GSR as a Senior Deputy Public Prosecutor. The criminal motion, on the other hand, is a private law remedy seeking the disqualification of GSR on grounds of conflict, bias and unfitness.

[22] The reliefs sought under the judicial review seek to impugn the AG's decision in exercising his powers under s. 376(3) CPC. Amongst the issues to be determined at the substantive stage are:

(i) Whether s. 376(3) read in the light of existing provisions of the relevant laws allows the AG as Public Prosecutor to appoint a part time Deputy Public Prosecutor who maintains a private practice.

(ii) Whether the Public Prosecutor's powers to engage a practising advocate and solicitor is limited to ss. 377 and 379 CPC.

(iii) Whether the Public Prosecutor in appointing GSR as per the terms in the letter of appointment had acted beyond the ambit of his powers under s. 376(3) CPC.

[23] Learned counsel for the applicants argued that the disqualification motion in the criminal proceedings is to determine whether GSR ought to be disqualified from continuing to act as Senior Deputy Public Prosecutor. The motion was anchored on the inherent jurisdiction of the criminal trial court. The crux of the motion is not the consideration of the legality or validity or the appropriateness of the AG's decision, but the appropriateness of the appointment of GSR and his continued appearance as a prosecutor.

[24] In resisting the appeal, the AG submitted that where a matter has been adjudicated as between parties by a court of competent jurisdiction, the parties are not permitted to re-litigate the matter. The public policy underlying the doctrine of *res judicata* is that there should be finality in litigation.

[25] In respect of the non-production of the letter of appointment, the issue, it was argued, must be rendered academic as a copy of the said letter was given to the applicants pursuant to the Federal Court's order dated 7 August 2019.

[26] With respect to GSR's appointment being *ultra vires* the powers of the AG under s. 376(3) CPC, the learned AG pointed out that the purpose of DS Najib's and TS Shafee's criminal motions were, *inter alia*, to disqualify GSR from acting as a Senior Deputy Public Prosecutor in the criminal trials. Further, the validity of the GSR's appointment under s. 376(3) of the CPC is relevant and material to the disqualification of GSR. However, the learned AG in his submission highlighted that the applicants did not raise this issue at the hearing of the criminal motions which has been finally disposed of by the Federal Court. Thus, the applicants are estopped from raising the same in the judicial review applications.

[27] It was also submitted that the raising of an issue in later proceedings may amount to abuse if the court is satisfied that the issue should have been raised in the earlier proceedings.

Our Decision

[28] Order 53 r. 2(4) of the ROC provides that "Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application". In arguing that leave should have been granted by the learned High Court Judge, learned counsel for the applicants contended as follows:

(i) the applicants are clearly persons who are adversely affected by the decisions, actions and omissions of the AG;

(ii) the decision and/or action of the AG appointing GSR as Senior DPP relate to the exercise of the public duties or functions of the AG;

(iii) the applicants have met the very low threshold required of them at this preliminary stage to show that he has *prima facie* an arguable case which is not frivolous and vexatious; and

(iv) there are grounds to consider the allegations made by the applicants at the substantive hearing for judicial review.

[29] The learned High Court Judge dismissed the application to commence judicial review principally on the preliminary objection raised by the respondents. Her Ladyship had concluded that the applications to commence judicial review and the disqualification motions in the criminal court sought the same reliefs. In her grounds of judgment, Her Ladyship opined:

> [12] I am of the considered opinion the prayers which the applicants are seeking here are the same prayers in the Criminal Motions. This is not an issue of jurisdiction, as both this Court and the Criminal court have jurisdictions on the same subject matter. It is just that this Court may issue an order of *certiorari* whilst the Criminal Court may grant an order to the AG to furnish the impugn letter of appointment to the applicants. In respect of the declaratory orders sought, both this court and the Criminal Court have concurrent jurisdiction.

[30] Counsels for the applicants submitted that leave should be granted if the applicants can demonstrate an arguable case which merits further investigation on an *inter partes* basis, and that *prima facie*, the applications are not frivolous or vexatious and that there is some substance in the grounds supporting the applications.

[31] The function of the court in exercising its power to grant leave to commence judicial review is to filter the application before it, that is, to determine whether the application is not frivolous and vexatious, and there is an arguable case to merit further argument. Lim Beng Choon J in *George John v. Goh Eng Wah Bros Filem Sdn Bhd & Ors* [1987] 1 LNS 111; [1988] 1 MLJ 319 (at p. 321) said that the court at the leave stage is only required to inquire whether the matter before it is not frivolous and vexatious. At the outset, it is very significant to take note that the application in the instant proceeding is not one for an order of *certiorari* but rather for leave to apply for such an order. On principle and authority, I am of the view that at this stage of the proceeding, the court is required only to inquire whether the matter to be decided by the court is not in fact frivolous and vexatious in the sense that it is a trivial complaint of an administrative error by a busybody with a misguided sentiment and misconception of the law. Another requirement at this stage of the proceeding which a court has to consider is that the applicant must produce sufficient evidence to sustain a *prima facie* case that a public officer or authority that made the decision had acted unlawfully or that he or it had in its exercise of the administrative discretion acted *ultra vires* the power given to him or it under the relevant

statute. If the court is satisfied that the applicant has complied with these two requirements, leave would usually be granted irrespective of whether the applicant has suffered no greater injury than thousands of the King's subjects.

[32] The Court of Appeal in *R v. Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] Crown Office Digest 109 laid down the guidelines which we find to be useful when considering an application for leave to commence judicial review:

(i) The judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

(ii) If the judge is satisfied that there is no arguable case, he should dismiss the application for leave to commence judicial review.

(iii) If on considering the application, the judge comes to the conclusion that she really does not know whether there is or is not an arguable case, the judge can invite the putative respondent to attend and make representations as to whether or not leave should be granted. The test to be applied by the judge at that *inter partes* leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

[33] A court hearing a judicial review application must determine whether "*prima facie* there is a genuine case for review". It is accepted that the threshold requirement is low, for leave will only be refused where an application is:

(i) frivolous and vexatious or hopeless;

(ii) made by busybodies with misguided or trivial complaints of administrative errors;

(iii) misconceived;

(iv) unarguable or groundless;

(v) where there is a more appropriate alternative procedure; or

(vi) where an application for judicial review is an inappropriate procedure.

(See: In *Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia* [1989] 1 LNS 76; [1989] 3 MLJ 298)

[34] The court would commonly refuse to grant leave in cases where the matters are non-justiciable. Gopal Sri Ram (JCA) (as he then was) in the case of *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 at p. 929, had the occasion to state:

> Applications for leave under O. 53 are made - and they must be made - through a two stage process. The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave *in limine*. So too will the court be entitled to refuse leave it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, e.g. proceedings in Parliament. (paras 5 & 10).

[35] The issue of justiciability in an application for leave for judicial review was discussed at great length by Mohamad Ariff Md Yusuf J (as he then was) in the case of *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2010] 1 LNS 1390; [2011] 1 MLJ 28:

> A good definition of "justiciability" can also be found in Chris Finn, "*The Concept of 'Justiciability' in Administrative Law*" in Groves & Lee, Australian Administrative Law (2007):
>
> The term "justiciability" refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a Court which feels that its resolution either is beyond the institutional competence of the Court or would involve stepping outside its appropriate constitutional role. (at p. 143).

In *Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33; [1990] 3 MLJ 228, Ajaib Singh SCJ, speaking for the Supreme Court said this:

> The guiding principles ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.

[36] In the reported judgment of *Dato' Seri Anwar Ibrahim v. PP* [2014] 1 CLJ 289; [2014] 1 MLJ 317, the appellant in criminal proceedings sought to disqualify TS Shafee from acting as DPP, and challenged his appointment on the basis that it was contrary to s. 378 of the CPC. The issue was determined by the Federal Court in the criminal appeal. Similarly, it was contended by the AG that the issue of the legality of GSR's appointment under s. 376(3) of the CPC could and should have been raised in the criminal motions.

[37] The learned AG urged this court to hold that all the relevant issues concerning the appointment and disqualification of GSR as Senior Deputy Public Prosecutor ought to have been raised in the criminal proceedings. Since the applicants did not do so they are estopped from mounting what is essentially a second attempt to disqualify GSR as Senior Deputy Public Prosecutor through these judicial review applications. The AG submitted that the court possesses the inherent jurisdiction to dismiss an action for abuse of process where a party attempts to re-litigate and reopen an earlier action. Even if *res judicata* is inapplicable or not strictly established, the applicants' applications cannot stand if it is found to be an abuse of process.

[38] The learned AG further submitted that the legality of GSR's appointment under s. 376(3) of the CPC forms part of the subject matter in both the criminal motions. However, the applicants failed to explain in their respective affidavits why this issue was not raised in the criminal motion. Learned AG further submitted that by electing to raise this issue in these proceedings, the applicants had shifted the goalposts after the issue of disqualification has been fully disposed of by the Federal Court.

[39] It was further submitted that the issues raised and the relief sought are not totally similar yet there is substantial duplication of the issues as well the relief sought in both actions. It was highlighted in the oral submission by the learned AG that the learned High Court Judge had recognised the multiplicity of proceedings and that the applications for judicial review are doomed to fail.

[40] In response to learned counsel for the applicants' submissions, the learned AG argued that the principles established in *Gouriet v. Union of Post Officer Workers* [1978] AC 435 at p. 524 conferred immunity from judicial review on the AG. Lord Fraser of Tulleybelton explained:

> If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression of course not in a party sense but in the sense of weighing the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts.

[41] With respect, we are unable to agree with the learned AG that the AG's prerogative powers are immune from judicial review as propounded in *Gouriet*. The Federal Court in *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561 having considered the principles of law on the subject said:

> [57] With respect, we are unable to agree with the learned SFC that the orthodox common law immunity from judicial review of the AG's prerogative powers laid down in the *Gouriet*'s case is still good law in view

of the House of Lords decision in the *GCHQ*'s case. The judgment in the *Gouriet*'s case is a reflection of past judicial refusal to enquire into the way in which a prerogative power had been exercised. With the progressive development of judicial review, the courts have been more willing to review the exercise of discretionary power, whether derived from statute or a prerogative power.

[42] In *Chin Chee Keow (supra)* Zawawi Salleh FCJ had eloquently explained:

> [71] The decision of the case above would suggest that the decision in *Gouriet*'s case is no longer good law and that the basis upon which it was decided no longer prevail. The present position is the AG is no longer regarded as the sole guardian of what is public interest, which was a central principle of the decision in the *Gouriet*'s case.
>
> [72] It is interesting to note that in England private individuals may now properly seek judicial review of decisions of the Public Prosecutor whether or not to initiate criminal proceedings. This power does not exist at the time of the judgment in the *Gouriet'*s case. In *R (B) v. Director of Public Prosecutors (Equality and Human Rights Commission intervening)* [2009] EWHC 106 (Admin); [2009] 1 WLR 2072, it was held at p. 52:
>
> > The exercise of the Court's power of judicial review is less rare in the case of a decision not to prosecute than a decision to prosecute (because a decision not to prosecute is not final, subject to judicial review, whereas a decision to prosecute leaves the defendant free to challenge the prosecution's case in the usual way through the criminal court) but is still exceptional.
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> [73] The Courts in England have consistently held that private individuals may seek judicial review of decisions of the public prosecutor not only in matters of initiation or failure to take court proceedings or to discontinue police investigations, but additionally of decisions whether to take over or discontinue ongoing private investigations (see *R v. DPP, Ex parte Duckenfield* [200]1 WLR 55 per Laws LJ at pp 67-68 and *R v. Crown Prosecution Service* [2011] EWHC 472 (Admin), [2011] 2 Cr App R 12 at para 147)
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> ...
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> [76] Singapore's courts have repeatedly affirmed that all powers are subject to legal limits. In *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 SLR (R) 525, [1988] SGCA 16, para. 86; *Tan Seet Eng v. Attorney-General* [2016] 1 SLR 779, [2015] SGCA 59, paras 1-2.), the courts held thus: "under the law, the AG's discretionary power is not absolute and he must act according to law, as his prosecutorial power is subject to legal limits. Prosecutorial discretion cannot be exercised in bad faith, or in a manner contrary to the quality guaranteed under art. 12 of the Constitution" (See *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 SLR (R) 49, [2007] SGHC 207, para. 148).

[43] The subject matter of the judicial review before us, that is, the Public Prosecutor's decision to appoint GSR as Senior Deputy Public Prosecutor is not non-justiciable. This is confirmed by the learned High Court Judge in *Muhammad Shafee Md Abdullah v. PP* [2019] 1 LNS 844 observed in his grounds of judgment:

> In any event the Applicant in their written submission had confirmed that he is not challenging the justiciability of the appointment before this court.

[44] In the instant appeal before us, the learned High Court Judge had applied the correct principles and concluded that the applicants had satisfied the test in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478:

> [8] I am of the considered opinion that the applicants have satisfied the test in *WRP Asia Pacific Sdn Bhd*, that is, there is an arguable case that merits the case to proceed for the substantive hearing. My reasons are as follows:
>
> (i) the AG has refused to give the letter of appointment of Gopal Sri Ram under section 376(3) of the CPC on the basis that "**the applicants has no right to a copy**". Such a simplistic reason is baffling, coming from the AGC. Surely there must be a legal and/or a constitutional reason for the rejection. In fact, in the case of *PP v. Dato Seri Anwar bin Ibrahim* [2014] 1 MLJ 633, the letter of appointment of the appointed DPP was before the court, so there is no issue of it being issued under the Official Secrets Act. In this case, the Court of Appeal said this in paragraph [15]:
>
> > [15] There is no doubt that the PP appointed Dato' Seri Shafee under s. 376(3), as clearly stated in the appointment letter of 02 July 2013. The appointment is specifically made for the purpose of the pending appeal in Rayuan Jenayah No. W-05-19-01 of 2012.
>
> (ii) Added to that, where the legal challenge is on the appointment of Gopal Sri Ram as the S/DPP, surely the very evidence of his appointment must be before the Court. Further, the Federal Gazette exhibited by the applicants does not show Gopal Sri Ram as a gazetted S/DPP. As such, leave should be granted to allow the AG to explain the legal reason for the rejection, and for the court to ascertain whether the reasons given are reasonable or irrational.
>
> (iii) There is also merit in the application seeking to declare the appointment of Gopal Sri Ram to be *ultra vires* and/or in excess of the statutory powers of the PP. This is based on the applicants' sworn affidavits, especially that of DSMN, in paragraphs 36:
>
> > 36. The Applicant was informed that Sri Ram was actively engaged **in directing and supervising all the investigations** undertaken by the Malaysian Anti-Corruption Commission and the Royal Malaysian Police which have culminated in the institution of the aforesaid criminal proceedings including the 1MDB case, the MOF case and the PAC case.

A In simple term, whether the empowerment of Gopal Sri Ram by the AG/PP under section 376(3) of the CPC qualifies him to act as a mini AG/PP in SPRM/PDRM.

(iv) there is also merit on the issue of whether the appointment of Gopal Sri Ram as a S/DPP raises the issue of conflict of interest, as he is also actively practising as an Advocate and Solicitor. The issue of conflict can also be raised in cases where Gopal Sri Ram though holding the post of S/DPP, cannot be seen to be acting against the PP in criminal cases/appeals.

[45] However, after having concluded that there was an arguable case, Her Ladyship decided to allow the preliminary objection on the basis it would be much convenient for the issues to be ventilated in the criminal courts:

[13] The only issue is on convenience. As the main trial is in the criminal courts, it is more convenient that these issues with regards to the appointment of Gopal Sri Ram as the S/DPP be addressed in the criminal High Court, as the applications are pending there too.

[46] We found merits in the submission of counsel for the applicants that in dismissing the application to commence judicial review on the basis of the preliminary objection, the learned judge failed to fully appreciate that there was no duplicity or multiplicity in proceeding. In our considered view, the learned High Court Judge erred when she allowed the preliminary objection. The only burden the applicants need to satisfy was the low threshold for leave to apply to commence judicial review as propounded in the authorities which we have alluded to. The learned High Court Judge had found that the applicants have succeeded in showing that there is an arguable case that merits the case to proceed for the substantive hearing. We agreed with this finding.

[47] The main issue for determination in the judicial review is the legality, validity and appropriateness of the appointment of GSR as Senior DPP by the AG. The doctrine of *res judicata* does not apply in this case as the applications involved different considerations and different reliefs. In the criminal motion, the court did not deal with the justiciability of the AG's decision to appoint GSR as Senior Deputy Public Prosecutor. The issue of justiciability of GSR's appointment will be considered by the court in the substantive hearing of the judicial review. On the other hand, the disqualification motions were to determine whether GSR ought to be disqualified from continuing to act as a prosecutor in the applicants' case. The applicable test in determining the disqualification is the "*Kallinicos* test" as propounded by the New Zealand Supreme Court in *Kallinicos v. Hunt* [2005] NSWSC 1181:

The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice,

including the appearance of justice [*Everingham v. Ontario*; *Black v. Taylor; Grimwade v. Meagher*; Holborow; *Bowen v. Stott*; *Asia Pacific Telecommunications*].

[48] The nature and jurisdiction of the judicial review applications and the disqualification motions before the criminal court are clearly separate and distinct. The former is a public law remedy to challenge the legality of AG's appointment of GSR. The latter is a private law remedy to seek GSR to be disqualified on grounds of conflict, bias and unfitness. The issue of multiplicity and duplicity does not arise as the remedies sought are different.

[49] This court in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 1 LNS 1837; [2019] MLJU 529 in considering the application for disqualification of GSR, observed:

> [19] At the outset, we take note of the Federal Court's decision in Criminal Appeal Bil (L)-71-03/2019 i.e. the decision in relation to the application by the appellant in another case for the production of the Letter of Appointment of Dato' Sulaiman Abdullah as DPP. In this regard the appellant relied on paragraph 12 of the said Federal Court's decision to support the view that a legitimate expectation arises against the LOA where a specific challenge is made against the validity of the said appointment. We note that in the context of our case, the said Federal Court's decision is not applicable as the facts are different. Firstly, Dato' Sulaiman Abdullah's appointment was made under section 379 of the CPC (where the appointment has to be "with the permission in writing of the Public Prosecutor") and secondly, there was no challenge as to the validity of the said appointment. That was the finding of this Court and also from the judgment of the Federal Court in Criminal Appeal Bil (L)-71-03/2019 wherein it is stated as follows:
>
> > 8. ... the basic premise that the respondent's motion in substance is not to challenge the validity of the appointment of Datuk Hj Sulaiman but only for the production of the letter of appointment. That was the view of the High Court and the Court of Appeal. There is no challenge by the respondent of this finding by way of cross appeal ...
> >
> > [12] ... In short ... unless there is a challenge to the validity to the appointment of the counsel, there exists no duty on the appointing authority or private entity to produce the letter of appointment …"
>
> [20] Compare it to the present case, the appointment of GSR was under section 376(3) of the CPC (no requirement that the appointment to be in writing) and that the appellant had mounted a challenge on the appointment of GSR in a Judicial Review proceedings in another court. In those proceedings the appellant seeks an order of *certiorari* quashing the PP's appointment of GSR. We find this argument is inconsistent with the appellant's own submission that "[T]his application (this Notice of Motion) amounts to sufficient challenge on the appointment of GSR's letter of appointment".

A The appellant urged this Court to take judicial notice of the aforesaid Judicial Review proceedings during oral submission.

We agreed with the respondent that this issue must be dealt with in the proper forum; otherwise the respondent will be denied of its rebuttal.

B **[50]** Thus, we are in agreement with the applicants' submissions that the proper challenge to the legality of the decision of the AG in appointing GSR as a Senior Deputy Public Prosecutor is by judicial review. David Wong Dak Wah (CJSS) in the case of *PP v. Dato' Sri Mohd Najib Hj Abdul Razak* [2019] 8 CLJ 313; [2019] MLJU 261 said:

C In short, we are saying that unless there is a challenge to the validity to the appointment of the counsel, there exists no duty on the appointing authority or private entity to produce the letter of appointment. The "busy body" argument has merits and apply with full force in this issue.

[51] This is further fortified by the Federal Court 's decision in the Sodomy D II appeals where Dato' Seri Anwar Ibrahim mounted several challenges to the appointment of the TS Shafee as a Deputy Public Prosecutor under s. 376(3) CPC. On 14 October 2014, the Federal Court dismissed the third disqualification application and pronounced that Dato' Seri Anwar Ibrahim ought to have filed an application for judicial review to question AG's decision to appoint TS Shafee as Deputy Public Prosecutor (See: Article in E The Edge). Unfortunately, the decision of the Federal Court is not reported in any of the law journals.

[52] Premised on this, we are of the considered view that the applicants are not estopped from mounting the judicial review applications. Consequently, F the argument of the learned AG of the applicants mounting a second attempt to disqualify GSR as Senior Public Prosecutor does not arise. In a similar vein, the learned AG's argument of the existence of an abuse of process must also necessarily fail.

Conclusion

G **[53]** For the above reasons, we unanimously allowed Appeal No. 146. As parties agreed to be bound by the decision of this court in Appeal No. 146, we also allowed Appeal No. 148 based on the same reasons. We further allowed the applications in the terms as sought. The orders of the High Court dated 20 February 2019 were set aside with no order as to costs. The cases H remitted to the High Court to hear the substantive applications.

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